STATE OF MICHIGAN

COURT OF APPEALS

FRANK J. BREWER,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

UNPUBLISHED
August 25, 2000

No. 216990
WCAC
LC No. 97-000790

Before: Meter, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Plaintiff appeals on leave granted an order of the Worker's Compensation Appellate Commission that affirms a magistrate's decision to deny an open award of differential worker's compensation benefits. We affirm.

Plaintiff began employment in defendant's automobile factory in 1965. In 1976, plaintiff was involved in a non-work related motorcycle accident, sustaining serious injuries to his foot, arm, and leg. Plaintiff's right leg was fractured, requiring the surgical insertion of a rod in his right femur. He was off work for about five years recovering from these injuries. When he returned to work in 1981, he was restricted from prolonged walking, standing, or stooping. His job upon returning to work was to operate a small in-plant truck, hauling steel throughout the factory. When this job was eliminated in 1995, plaintiff was assigned to operate a forklift. Because the forklift had to be operated in reverse for much of the time, plaintiff was required to twist around on his right hip and look over his shoulder. After about four or five months of operating the forklift, plaintiff began to experience pain in his right hip. Plaintiff sought medical treatment in February 1996, and a restriction was placed on the amount of time he spent sitting. As a consequence of this restriction, plaintiff was assigned to an inspection and maintenance job that he currently performs.

Plaintiff sought differential benefits for the lost wages he would have earned in the forklift job, which paid substantially more than his current job. Trial was held before a magistrate in October 1997. Besides plaintiff, the only other witness was Mark D. Russell, D.O., a board certified orthopedic surgeon, who testified by deposition. Dr. Russell testified that x-rays indicated the rod used to repair plaintiff's fractured right femur following his motorcycle accident had shifted and was protruding into

plaintiff's buttock area, causing the pain that plaintiff experienced while operating the forklift. Dr. Russell opined that plaintiff's work duties were not the cause of the rod shifting in his leg.

Based primarily on the testimony of Dr. Russell, the magistrate found that "the pressure placed on the hip by plaintiff's work merely produced a symptomatic response," and an employee is not entitled to benefits for a non-work related condition unless the work has accelerated or aggravated the non-work related condition, citing *Kostamo v Marquette Iron Mining Co*, 405 Mich 105, 116; 274 NW2d 411 (1979). The magistrate denied differential benefits for plaintiff.

Plaintiff appealed to the WCAC, which affirmed the magistrate's decision. The WCAC noted the magistrate's finding that plaintiff had not established a work-related injury was supported by the record, and the magistrate had properly applied the legal holding of *Kostamo*. This Court granted plaintiff's application for leave to appeal. We affirm.

The findings of fact by the WCAC most pertinent to this appeal are the following:

> Plaintiff testified that the injury requiring the insertion of a rod was a non-work related injury, and it is so found. It is further found, per the testimony of Dr. Russell, that the rod used to fix plaintiff's fractured femur had shifted and was protruding into the buttock area causing plaintiff's pain. Dr. Russell specifically stated the plaintiff's work had nothing to do with the shifting rod. It is therefore found that the pressure placed on the hip by plaintiff's work merely produced a symptomatic response. [Opinion of WCAC quoting Magistrate Crary E. Grattan, p 2.]

Pursuant to *Mudel v Great Atlantic & Pacific Tea Co*, ___ Mich ___; ___ NW2d ___ (2000) (Docket Nos. 111702; 113799, decided 7/25/2000), this Court must treat the WCAC's factual findings as conclusive if supported by any record evidence. Although on appeal plaintiff frames the issue on the basis that the denial of differential compensation "is contrary to law and is not supported by competent, material, and substantial evidence on the whole record," the crux of plaintiff's argument is based on the following statement in *Cox v Schreiber Corp*, 188 Mich App 252, 258; 469 NW2d 30 (1991):

> Awarding or withholding benefits on the basis of whether pain is a symptomatic manifestation of a preexisting condition rather than an aggravation of a preexisting condition is a distinction without a difference.

However, the next sentence of this Court's opinion in *Cox* expressly indicates that the proposition of law relied on by plaintiff is dictum:

> In any event, plaintiff's situation can be distinguished from the "exacerbation of symptoms" cases. Unlike the cases where the worker recovers from a bout of dermatitis or the pain of thoracic outlet syndrome and then returns to the same condition as before the trauma, in this case, plaintiff's hips were not in the same condition as they were before . . . [*Id.* at 259.]

Although *Cox* was not an "exacerbation of symptoms" case, this Court is familiar with the two "irreconcilable" lines of authority noted in *Laury v GMC (On Remand, On Rehearing)*, 207 Mich App 249; 523 NW2d 633 (1994), special panel not convened, 207 Mich App 801; 524 NW2d 270 (1994). On appeal, the parties request this Court to adopt the authority favorable to their position. In addition, plaintiff and defendant dispute the precedential effect of *Laury* in view of its apparent conflict with the Supreme Court decision of *Kostamo v Marquette Iron Mining Co*, 405 Mich 105; 274 NW2d 411 (1979). Despite the significance of the disputed positions of the parties, we find it unnecessary to resolve the conflict because its resolution is not dispositive to the present appeal.

The exacerbation of symptoms cases are best characterized by *Anderson v Chrysler Corp*, 189 Mich App 325; 471 NW2d 623 (1991). In *Anderson*, the plaintiff suffered from a preexisting skin condition known as "hyperkeratosis palmaris." While in contact with oil and grease during his work with the defendant, the plaintiff experienced flare-ups of contact dermatitis, lesions, and rashes due to his exposure to the grease and oil. In reversing a WCAB award of open benefits and holding that the plaintiff was entitled only to a closed award for the period in which his flare-ups continued, our Court stated:

> The plaintiff's situation is very similar to that of the plaintiffs in *Thomas v Chrysler Corp*, [164 Mich App 549; 418 NW2d 96 (1987)] *supra*, *Durham v Chrysler Corp*, 128 Mich App 102; 339 NW2d 705 (1983), and *Carter v General Motors Corp*, [361 Mich 577; 106 NW2d 105 (1960)] *supra*. Those cases held that work which causes an aggravation of symptoms only, and not an acceleration or aggravation of the underlying condition, entitles a plaintiff to a closed award at most. 164 Mich App 555. *Nezdropa v Wayne Co*, 152 Mich App 451; 394 NW2d 440 (1986), cited by plaintiff, is distinguishable because once plaintiff's rash and pain subsided he was perfectly capable of working. He admitted as much. [*Id.* at 329.]

The other cases relied on by plaintiff, *Siders v Gilco, Inc*, 189 Mich App 670; 473 NW2d 802 (1991), and *McDonald v Meijer, Inc*, 188 Mich App 210; 469 NW2d 27 (1991), similarly involve work-related exacerbation of symptoms for which our Court held may entitle the plaintiff to a closed, not open, award of benefits. As this Court held in *Siders*, *supra* at 673:

> A closed benefit award is not only permitted, but is the only type available where an employee's symptoms, rather than the underlying condition, are aggravated by his employment.

In the present case, plaintiff seeks an open, not closed, award for differential wage benefits. Regarding his exacerbation of symptoms, plaintiff testified that since leaving the forklift job and performing an inspection job and now a maintenance job, his hip is "much better." However, plaintiff feels incapable of returning to the forklift job because if he did his pain "would start aggravating me again." It is not disputed that plaintiff's pain ceased when he stopped working the forklift job. Assuming, but without deciding, that the exacerbation of symptoms line of authority is viable, we conclude it is inapplicable because plaintiff does not claim a closed award of benefits. The WCAC correctly upheld the magistrate's denial of wage differential benefits.

Affirmed.

/s/ Patrick M. Meter
/s/ Richard Allen Griffin
/s/ Michael J. Talbot